

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 1359

IN THE MATTER OF:

REMANDS from United States Court)	Served: October 10, 1974
of Appeals for the District of)	
Columbia Circuit of D. C. Transit)	
System, Inc., Proceedings:)	
Application of D. C. Transit)	Application No. 453
System, Inc., for Authority to)	
Increase Fares)	Docket No. 156
Application of D. C. Transit)	Application No. 436
System, Inc., for Authority to)	
Increase Its Fleet in Lieu of)	Docket No. 156
Purchasing Buses)	
Application of D. C. Transit)	Application No. 226
System, Inc., for Authority to)	
Increase Fares)	Docket No. 32
Application of D. C. Transit)	Application No. 344
System, Inc., for Authority to)	
Increase Fares)	Docket No. 101
Application of D. C. Transit)	Application No. 573
System, Inc., for Authority to)	
Increase Fares)	Docket No. 201
Application of D. C. Transit)	Application No. 553
System, Inc., for Suspension)	
of the Program for the Purchase)	Docket No. 201
of New Buses)	
Application of D. C. Transit)	Application No. 613
System, Inc., for Authority to)	
Increase Fares)	Docket No. 216

By Order No.1356, served simultaneously herewith, we have directed D. C. Transit System, Inc. (Transit) to deposit with the Commission the sum of \$1,461,756, being the amount of excess earnings realized by Transit during the effective period of Order No. 245, served April 12, 1963.

As we indicated in Order No. 1317, served April 4, 1974, the United States Court of Appeals for the District of Columbia Circuit (Court) has requested that we provide it with recommendations concerning the disposition of any restitution found to be the farepayers. In that we have found that some amount should be placed in a Restitution Fund, we believe it is proper to consider the several statements submitted by various parties concerning the appropriate management of this fund.

According to the decision of the Court, the first thing to be determined is the amount of restitution. Then a determination should be made as to the method of providing restitution to the farepayers. Transit submits that restitution is essentially an equitable remedy and that the decision of the amount of restitution to be made must be governed by equitable consideration. The statement filed by counsel of the Democratic Central Committee of the District of Columbia requests that the Commission promote the public interest it was created to protect by promptly awarding substantial restitution to the farepayers.

Leonard N. Bebchick et al., (Bebchick) submits that the Commission is required to recommend to the Court the use to be made of the Riders' Fund. Bebchick believes that all parties should participate in this aspect of the remand proceeding. Bebchick states that the appropriate procedure would be the submission of written memoranda and reply memoranda by all parties. Oral argument could be held before the Commission. Bebchick submits that a hearing should not be held unless a party files a motion within 15 days following the submission of such reply memoranda showing good cause as to why the production of evidence or the conduct of cross-examination is required. Bebchick suggests that the submission of memoranda be deferred until 30 days following the date upon which the Commission is in receipt of a portion of the funds constituting the Restitution Fund. The Washington Metropolitan Area Transit Authority (WMATA) agrees that all parties to the remand proceeding

should be afforded an opportunity to submit recommendations as to the disposition to be made of any restitutional amount. However, the Black United Front believes that consideration of the issue of restitution should be postponed until after a determination of the amount of any restitution.

WMATA recommends that the available funds be transferred to WMATA to be used to improve its ridership through a program of marketing. The marketing program would provide specifics of the company's service including its routes, schedules, transfer points, terminals and stop locations, and other items of similar information. WMATA contends that several other possible recommendations should be rejected. These recommendations of methods of applying the funds include the following: offset to the current and projected bus operation deficits, purchase of new buses, provide free rides to the farepaying public for a period of time, and the purchase of bus shelters, bus storage garages and other facilities.

Bebchick opposes the employment of WMATA to hold, manage, supervise or disburse the Restitution Fund. Bebhick argues that as the operating agency, WMATA possesses an inherent conflict of interest in discharging the fiduciary responsibilities to the Court and the riding public which are required of one who manages the fund and determines how it is to be spent. The Staff joins in the statement of Bebhick that WMATA should not hold, manage, supervise or disburse the Restitution Fund. The Staff states that the Restitution Fund should not be used to make the public aware of the service of WMATA. Rather, the Staff believes that the Restitution Fund involves fares improperly paid to Transit and that to the extent feasible these funds should be returned to the farepayers through the farebox.

WMATA disagrees that there would be an inherent conflict of interest in discharging the fiduciary responsibilities to the Court and the riding public. WMATA submits that it is the logical selection to administer such funds. WMATA believes that it is the appropriate agency to manage the Restitution Fund for the following reasons: (1) it has not been involved in previous litigation and hearings regarding the matters under review; (2) it is a public body, supported by the signatories to its interstate compact and the Federal government, charged with the responsibility of providing mass transportation to

the National Capital area; (3) the aggrieved public to whom restitution is due are the residents of the National Capital area who used the public bus transportation system previously owned and operated by Transit; (4) it presently is the operator of the public bus transportation system; (5) it is governed by a Board of Directors directly responsible to the citizens the system is intended to serve; (6) it has no pecuniary interest in the administration, management and supervision of such funds; and (7) the interest of the Court, Commission and the farepaying public is well served by direct application of such funds to increasing the ridership and decreasing the cost of the system. WMATA further argues that no other party to these proceedings or body that could be appointed, created or organized could efficiently accomplish these intended goals without extensive surveys, hearings and other dilatory mechanisms that would unjustly and unwarrantably dissipate a large portion of any restitution prior to its application to the benefit of the farepaying public.

Transit states that in Order No. 984, served October 24, 1969, the Commission determined that if Transit did not attain the level of net operating income of \$1,700,000 allowed by the Commission as the fair return for the 12-month period ending October 31, 1970, the credit remaining in the Court Ordered Reserve (Reserve) would be available to offset any deficit and that Transit could recoup such deficit by applying for permission to remove the amount of such deficit from the Reserve and transfer such amount to Transit's Retained Earnings Account. If there had been a greater credit balance in that Reserve at that time, Transit submits that it would have been entitled to apply for permission to remove the amount necessary to offset the deficit in Transit's net operating income for the 12-month period ending October 31, 1970. Transit recommends that it be permitted to remove from the Reserve and place in its Retained Earnings Account such amount as may be present in the Reserve as a result of the remand proceeding. The funds to be transferred would be the amount required to bring the net operating income of Transit for the 12-month period ending October 31, 1970, to \$1,700,000.

Transit further states that the Commission refused to approve Transit's request for a fare increase in the case

leading to Order No. 1216, served May 19, 1972, because of the findings set forth in the Loconto Report. Transit opines that if the appreciation in the market value of the properties of Transit had been reflected on the books of Transit at the time of Order No. 1216 and if the shareholder equity had been increased accordingly, then the debt-equity ratio of Transit would have been very substantially improved. If such improvement had been reflected on Transit's books prior to the Loconto Report, Transit argues that it would have been entitled to all or at least some part of the fare increase sought. Transit contends that although it is too late for Transit to recoup the fare increase or any part of it, that under the equitable doctrine applicable to restitution referred to by the Court and under the doctrine from the Restatement of Restitution §142 (1), Transit should be allowed an offset to the amount of restitution for the relief it would have been entitled to if its shareholder equity had been substantially increased before the time of the Loconto Report and Order No. 1216.

Transit recommends that at the conclusion of all of the remand determinations it be permitted to recoup from the Reserve the full amount of the \$3,290,000 which the District of Columbia (District) required Transit to pay pursuant to the track removal agreement dated January 11, 1973. Transit argues that the obligation for track removal and repaving is the obligation of the farepaying public.

Transit further recommends that a determination should be made and a deduction taken for the amount by which the appreciation in market value of land transferred to non-operating status was allowed as a charge against the recomputed operating income in the proceeding under Order No. 773, served January 26, 1968, when determining the restitution to be allowed under Order No. 1052, served June 26, 1970.

Transit also states that it will be necessary to utilize expert witnesses in connection with the appraisals of the properties involved, and contends that it should be allowed to recover all of its costs and expenses incurred in connection therewith from the reserves and/or funds which are the subject of the instant proceeding.

The Staff believes that Transit should not be permitted to recover from the Reserve the amount by which its net operating income was less than \$1,700,000. According to the Staff, Order No. 984 provided for the use of the credit remaining in the Reserve as an offset to any deficit resulting from Transit's operations. The Staff argues that the remand proceeding does not involve that facet of Order No. 984, and that to reconsider that order would involve factors not before the Commission at this time. The Staff also does not agree that the appreciation in market value should be credited to the shareholder equity account. The Staff contends that the Court clearly decided that the appreciation in market value belonged to the farepayers and not to Transit's investors, and that Transit's contentions constitute a collateral attack upon the Court's decision in D. C. Transit Sys., Inc. v. Washington Metropolitan Area Transit Com'n., 466 F.2d 394 (1972). The Staff further argues that the remand proceeding currently being considered by the Commission does not involve any facet of the track removal and paving accounts. The Staff urges the Commission not to unduly or unnecessarily broaden the issues in the remand proceeding by including consideration of Transit's track removal agreement with the District. Finally, the Staff submits that Transit is not entitled to recover any costs or expenses under the law of the remand proceeding.

District asserts that Transit should not be permitted to offset from the Reserve any earnings deficiency for the 12-month period ending October 31, 1970, so as to bring the net operating income of Transit for that period to \$1,700,000. District contends that to do so would be to compensate Transit for past losses and would violate the regulatory principle which merely gives an utility an opportunity to earn a fair return and never guarantees a fair return. District states that Transit should not be permitted to offset from the Reserve the \$3,290,000 which the District has required Transit to pay for track removal.

WMATA believes that Transit's recommendation as to a public hearing on the proposed methods of restitution is dilatory and useless. WMATA asserts that the Commission has the authority to recommend to the Court the method by which restitutional relief is to be applied to benefit the farepaying public.

DISCUSSION CONCLUSIONS

We are of the opinion that each of the several contentions of Transit are without merit. Each of the requests to direct some amount of the restitution to Transit rather than to the farepayers involves matters beyond the scope of the remand proceeding.

The decision in Order No. 984 by the Commission to allow Transit to transfer from the Reserve such amount as required to allow Transit to attain the level of \$1,700,000 in net operating income for the 12-month period ending October 31, 1970, has been neither held improper by the Court nor remanded to us for our further consideration.

The Commission decision in Order No. 1216 has been reviewed by the Court and found to be proper. The argument that the shareholder equity should be increased by the appreciation in market value of the properties transferred from operating to nonoperating status is completely without basis and is contrary to the Court's decision that the appreciation in market value belonged to the farepayer and not the investor.

With respect to the agreement between Transit and the District relating to Transit's obligation to remove tracks as provided in the franchise act, we believe that the matter cannot be questioned. The obligation of Transit apparently has been resolved by private agreement between Transit and the District. Moreover, the Court has not remanded to us any aspect of the track removal expense account and we do not believe that any benefit would be realized by unduly broadening these proceedings by incorporating herein a collateral action by Transit against the farepaying public for recovery of an amount Transit voluntarily agreed to pay to relieve it from its franchise obligations.

With respect to the request by Transit that it be permitted to recover from the Restitution Fund any costs or expenses incurred in the remand proceedings, we believe that the request should be rejected. The Court has directed us to determine the amount paid to Transit by the farepayers in

excess of that which should have been paid. Transit improperly holds this amount. The farepayers should not pay Transit the expense of litigation directed at retaining the amount improperly held.

We shall direct that detailed statements framing recommendations as to the precise restitutional relief to be accorded the farepayers and rebuttal statements be filed and served by the several parties.

THEREFORE, IT IS ORDERED that the Commission Staff, Leonard N. Bebchick et al., Black United Front, Democratic Central Committee of the District of Columbia, District of Columbia, D. C. Transit System, Inc., Washington Metropolitan Area Transit Authority, and the Washington Construction Area Industry Task Force shall file with the Commission and serve upon the parties detailed statements framing recommendations as to the precise restitutional relief to be accorded the farepayers on or before Friday, November 1, 1974, and rebuttal statements on or before Tuesday, November 12, 1974.

BY DIRECTION OF THE COMMISSION:

A handwritten signature in dark ink, appearing to read "W. R. Stratton", with a long horizontal line extending to the right.

WILLIAM R. STRATTON
Vice Chairman